



Decision Notice 124/2024

Independence Referendum Bill - Lord Advocate's reference to Supreme Court

Authority: Scottish Ministers
Case Ref: 202201060

Summary

The Applicant asked the Authority for correspondence and documentation relating to the Lord Advocate's reference to the Supreme Court regarding the legislative competence of the Scottish Parliament to stage a future independence referendum. The Authority stated that complying with the request would exceed the £600 cost limit, so it was not obliged to comply. Following an investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15 (Duty to provide advice and assistance); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 21 July 2022, the Applicant made a request for information to the Authority. The Applicant requested:

- (i) Any correspondence, between 1 January 2022 and 28 June 2022, including meetings, notes, memos, agendas, ministerial briefings and minutes, on the topic of the decision to request the Lord Advocate to consider making a reference to the Supreme Court.
 - (ii) Any attachments to this internal correspondence.
2. The Applicant stated that this should include, but not be limited to, emails, letters, WhatsApp and Signal messages, OneNote memos and texts between officials, special advisers, Ministers, Ministerial private offices and civil servants.
3. The Authority responded on 16 August 2022, refusing the request in terms of section 12(1) of FOISA as it considered the cost of complying would exceed the specified limit of £600. The Authority suggested to the Applicant that he might wish to narrow the scope of his request to bring the cost of complying below £600 and referred him to the Commissioner's guidance on how to do so.
4. On 16 August 2022, the Applicant wrote to Authority requesting a review of its decision. The Applicant stated that he was dissatisfied because he disagreed that it would cost more than £600 for the Authority to comply with his request and because it had failed to provide him with a cost calculation (which he contended was because it had not properly undertaken that work).
5. The Authority notified the Applicant of the outcome of its review on 13 September 2022, fully upholding its original decision for the reasons previously stated. The Authority provided the Applicant with a cost calculation, which estimated the cost of complying with his request as £706.50. The Authority also advised the Applicant to narrow the scope of his request, either by time period or subject matter, to bring the cost of complying below £600.
6. On 26 September 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he believed it would not cost the Authority more than £600 to comply with his request.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 17 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
9. The case was subsequently allocated to an investigating officer.
10. The investigating officer invited the Authority to answer specific questions. These related to the searches it had carried out and to its justification for applying section 12(1) of FOISA.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 12(1) – Excessive cost of compliance

12. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.
13. The projected costs a Scottish public authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it will incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA.
14. The authority may not charge for the cost of determining whether it:
 - (i) holds the information, or
 - (ii) should provide the information.
15. The maximum hourly rate the authority can charge for staff time is £15 per hour.

The Authority's submissions

16. The estimated cost of compliance set out in the Authority's review response was £706.50, which was based on searches of Outlook and personal files by five of 13 key officials identified by the case handler and a further search of the Authority's electronic records management system (eRDM) by the case-handler. The full breakdown of this estimate is provided in Appendix 2.
17. However, the Authority confirmed that it had failed to retain full details of the searches informing the above cost calculation.
18. The Authority therefore considered the estimate cost of complying afresh, resulting in a new estimate of £1,440. This was based on the results of searches of Outlook and personal folders by three of the 13 key officials (who had been asked to undertake fresh searches). The full breakdown of this estimate is provided in Appendix 2.
19. The Authority explained that it had decided not to search its eRDM as, on reflection, it was satisfied that the information held by the 13 key officials in their Outlook and personal files would include information also held there.
20. The Commissioner asked the Authority to explain why it considered searches of the above officials' Outlook and personal files to be the best way of locating the information requested by the Applicant and why the information was not held in a central file or location, given the importance of the subject matter.
21. The Authority explained that it interpreted the Applicant's request for "correspondence" as encompassing decision-making around asking the Lord Advocate to consider a reference to the Supreme Court and not solely to correspondence relating to the final decision to do so.
22. The Authority considered that the Applicant's request therefore included official-level correspondence leading up to the decision, as well as communication with the Authority and the Lord Advocate.

23. The Authority explained that this information is held by a project group spanning a number of business areas, including the Referendums Scotland Bill Team, the Scottish Government Legal Directorate (SGLD), the Parliamentary Counsel Office and Legal Secretaries to the Lord Advocate.
24. Within this project group, the Authority identified 13 key officials it considered most likely to hold information within the scope of the Applicant's request as they had worked on initial scoping and decision-making processes around the reference, preparation of the Independence Referendum Bill and the preparation of a statement made by the First Minister on 28 June 2022.
25. The Authority explained that information was held by individual business areas, rather than in a central file, and the breadth of business areas involved in the Lord Advocate's reference made central collation of that information impractical.
26. The Authority noted that there were a number of folders where the information was stored, but that the key officials identified would hold a wider range of material within the scope of the request in their Outlook files, including internal discussions not forming part of the official record, documentation not yet filed and drafts of documents.
27. The Authority also explained that officials working on the reference routinely held copies of material already filed in the relevant eRDM folder within Outlook for ease of reference and use and that searches of Outlook would therefore identify material already held in official folders, as well as anything not considered to be part of the official record or that had yet to be filed.
28. The Authority noted that the revised estimated cost of compliance of £1,440 did not include sift and redaction time for the other ten key officials and or information potentially held by the named special advisors and ministerial private officers in the Applicant's request.
29. The Authority submitted that, based on the returns of three of the 13 officials, the Applicant's request already exceeded the upper cost limit under FOISA and that undertaking the further work set out in the above paragraph would take it substantially further over the cost limit.

The Applicant's submissions

30. The Applicant explained that he did not believe section 12(1) of FOISA should apply as he considered that the cost of complying with his request had been inflated by the Authority.
31. The Applicant also expressed concern, following the Authority's revised cost calculation, that the estimated cost of compliance had more than doubled.

The Commissioner's view

32. Having considered all of the relevant submissions and the terms of the Applicant's request, the Commissioner accepts that the Authority's interpretation of the scope of the request was reasonable.
33. The Commissioner acknowledges that the Applicant believes the Authority should be capable of providing the information he requested without exceeding the £600 cost limit under FOISA.
34. However, the Commissioner is required to consider whether section 12(1) of FOISA applies in this case, with regard to the recording systems in use by the Authority, and not with regard to what an Applicant might wish these systems to be capable of.

35. The Commissioner accepts from the submissions that, despite the significance of the subject matter sought, a single central file does not exist. As such, the Commissioner is satisfied that the Authority took adequate and proportionate steps in the circumstances to establish the information falling within the scope of the Applicant's request.
36. Considering the nature of the way the information is held, the volume of information identified as falling within scope, the information likely to be yielded from searches by the other ten officials and the time likely to be required for the actual process of redaction, the Commissioner is satisfied that the cost of complying with the Applicant's request would exceed the £600 limit under FOISA.
37. In all of the circumstances, therefore, the Commissioner finds that the Authority was correct to refuse the request under section 12(1) of FOISA.

Handling of request

Section 15 – Duty to provide advice and assistance

38. Section 15 of FOISA requires a public authority to provide reasonable advice and assistance to someone making an information request. Where the cost of complying with a request is likely to exceed the £600 limit, the public authority should consider what information could be disclosed free of charge or within the cost limit, in order to comply with the duty to provide advice and assistance.
39. The Commissioner considers that where section 12(1) of FOISA is engaged, the duty to provide advice and assistance is particularly important in order to enable a requester (who will not necessarily understand how information is held or organised) to effectively narrow the scope of their request.
40. In this case, the Authority's approach was to ensure its searches were as comprehensive as possible while providing the Applicant with fairly generic advice and assistance. Ultimately, however, this resulted in no information being disclosed to the Applicant.
41. Should similar situations arise in the future, the Commissioner would urge the Authority to fully engage with requesters, in line with its duty under section 15 of FOISA, to enable requesters to understand how information is held and how they might narrow the scope of their requests to either obtain all of the information they are seeking or at least some of it.
42. However, the Commissioner notes that, during the course of his investigation, the Authority provided further advice and assistance to the Applicant to enable him to make a narrower request.

Loss of search returns

43. The Commissioner is also concerned that the Authority failed to retain full records of its original searches.
44. While the Authority has apologised for this and explained it was as a result of resourcing pressures, it is critical, as the Commissioner's guidance makes clear, that such records are retained.
45. In the Commissioner's view, retaining this information is particularly important when public authorities refuse to comply with a request on the basis of excessive cost of compliance under section 12(1) of FOISA.

46. This is because a frequent source of dissatisfaction with such refusals is that the requester does not accept that it would cost more than £600 to comply with their request. In such cases, it is obviously problematic if, in the event the requester subsequently appeals to the Commissioner, the public authority has failed to retain full details of the searches it carried out to inform the cost calculations being disputed.

Accurate costings at review stage

47. On a related note, the Commissioner notes the significant difference between the estimated cost of compliance provided by the Authority at review stage and during his investigation.
48. While the Commissioner can accept some margin of difference between cost calculations, requesters are entitled to a robust costing at review stage. In this case, this clearly did not happen.
49. The Commissioner would therefore also like to urge the Authority to ensure that when refusing to comply with requests under section 12(1) of FOISA that, in line with paragraph 9.4.2 of its [Code of Practice on the Discharge of Functions by Scottish Public Authorities](#)¹, it provides requesters with an estimate (which should be robust) of how the cost of complying with their request would exceed the cost limit.
50. The Commissioner also notes that the Authority provided erroneous calculations in its review response: it referred to 240 minutes for searches, 750 minutes to sift the information located and 1,010 minutes to redact that information. This amounts to a total of 2,000 minutes (33.3 hours) which, multiplied by £15 per hour, leaves a total estimate of around £500.
51. However, the Commissioner is satisfied, based on submissions provided by the Authority, that this was a typographical error.
52. The Commissioner accepts that the Authority intended to refer to 240 minutes for searches, 1,101 minutes to sift the information located and 1,485 minutes to redact that information. This amounts to a total of 2,826 minutes (47.1 hours), which, multiplied by £15 per hour, leaves a total estimate of £706.50 (the same total estimate provided by the Authority in its review response).
53. The Commissioner would therefore also like to urge the Authority to ensure that it takes greater care when providing calculations to ensure that they are accurate and free of errors (typographical or otherwise).

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

¹ [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

David Hamilton
Scottish Information Commissioner

18 June 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.
- ...

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
- ...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;

- (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

Appendix 2: Summary of Authority's original and revised cost calculation

Table 1: Summary of the Authority's cost calculation:

| | Original Estimate | Revised Estimate |
|--|--|---|
| eRDM search by case-handler | 180 minutes | [Discounted] |
| Officials searching Outlook/personal files | 5 | 3 |
| Actual Outlook/personal files Search Time per official | 12 minutes | 10 minutes |
| Total Search Time (a) | Actual 240 minutes (180 eRDM + 60 mins outlook (5 officials x 12 minutes)) | Forecast 130 minutes (10 mins x 13 officials, including case-handler) |
| Documents returned potentially in scope | 367 (from 3 teams) | 1115 (from 3 officials) |
| Time taken to sift a sample of 30 documents | 90 mins (3 mins per doc) | 30 mins (1 min per doc) |
| Time forecast to sift all documents (b) | 367 @ 3 minutes per document = 1,101 minutes | 1115 @ 1 minute per document = 1,115 minutes |
| Number of sifted documents actually out of scope | 3 of 30 out of scope (10%) | 3 of 30 out of scope (10%) |
| Total documents to be considered | 367 – 10% = 330 | 1115 – 10% = 1004 |
| Documents requiring redaction | Estimated 10% do not require redaction: 33 330-33 = 297 documents requiring redaction | Estimated 10% do not require redaction: 100 1004-10% = 904 documents requiring redaction |
| Time taken to redact sample of 5 documents | 25 minutes @ average of 5 minutes per document | 25 minutes @ average of 5 minutes per document |
| Time forecast for redactions (c) | 297 x 5 minutes = 1,485 minutes | 904 x 5 minutes = 4,520 minutes |
| Total resource time (a+b+c) | 240 minutes + 1,101 minutes + 1,485 minutes = 47 hours and 6 minutes | 130 minutes + 1,115 minutes + 4,520 minutes = approximately 96 hours |
| Total cost @ £15 per hour | 47.1 hours x £15 = £706.50 | 96 hours x £15 = £1,440 |